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IN THE

Supreme Court of the United States

OCTOBER TERM 1964

No. 1093

TENNESSEE GAS TRANSMISSION COMPANY, *Petitioner*

v.

FEDERAL POWER COMMISSION, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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v.

FEDERAL POWER COMMISSION, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit in the above-entitled case centered on December 30, 1964.

CITATIONS TO OPINIONS BELOW

The opinion of the Respondent, Federal Power Commission (R. 2152), is reported at 30 F.P.C. 1477. The opinion of the Circuit Court of Appeals, printed in the Appendix hereto, *infra,* p. 1a is reported in 340 F 2d 100. The companion decision rendered the same

day in *Pan American Petroleum Corp.* v. *Federal Power Commission,* is also printed in the Appendix hereto, *infra,* p. 8a, and is reported in 339 F. 2d 694.[1]

JURISDICTION

A petition for rehearing *en banc* was denied by the Court of Appeals on February 11, 1965. By order of the Court of Appeals dated February 19, 1965, its mandate was stayed to April 22, 1965 or until final disposition of proceedings in this Honorable Court.

The jurisdiction of this Court is invoked under Section 19(b) of the Natural Gas Act [15 U.S.C. §717r(b)] and Chapter 81 of the Judicial Code, 28 U.S.C. §1254.

QUESTION PRESENTED

Whether the Respondent Federal Power Commission can construe a certificate of public convenience and necessity, upon the basis of criteria announced after the issuance of such certificate, as not authorizing the construction and operation of facilities undertaken by Petitioner in reliance upon such certificate.

STATUTE INVOLVED

The statutory provisions involved are Sections 7(c) and (e) of the Natural Gas Act, 15 U.S.C. §717f(c) and (e). They are printed in the Appendix hereto, *infra,* pp. 13a-14a.

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[1] The record in the Court below has been certified to this Court in Nos. 1024 and 1025 in which petitions for certiorari have been filed to review the decision in *Pan American Petroleum Corp.* v. *Federal Power Commission,* 339 F. 2d 694 (10th Cir., 1964). Reference is made in this petition to such record.

STATEMENT OF THE CASE

These proceedings involve the question of whether service undertaken by Petitioner pursuant to what it in good faith considered to be a valid certificate of public convenience and necessity issued pursuant to Sections 7(c) and (e) of the Natural Gas Act [15 U.S.C. §717f(c) and (e)] was in fact authorized by the certificate. The certificate in question is of a type that has come to be known as a "budget-type" authorization. This type of certificate does not specify the exact facilities authorized, but instead constitutes a blanket authorization for construction of facilities to attach new gas supplies during a calendar year. The only qualification in the authorization concerns the cost of the facilities.

The genesis of the "budget-type" certificate is in the commendable efforts of the Respondent to expedite the issuance of certificates for the construction and operation of facilities in the face of a statute which requires notice and hearing in all instances. To this end the Respondent in 1956 issued its Order No. 185, 15 F.P.C. 793, wherein the problem was considered. This order rejected, as beyond the Respondent's power under the Act, a suggestion that the term "facilities" in the Natural Gas Act be redefined by the Respondent "to exclude minor installations or changes in connection with the rendition of service to existing customers or markets."[2] It noted, however, that it had requested such authority from Congress, and that

> "In the meantime and as a substitute, the Commission advises any interested natural-gas com-

[2] Respondent did not explain why it could not define "facilities" in the particular instance, although it had already done so under other circumstances. See 18 C.F.R. § 2.55.

pany subject to the Natural Gas Act that it may file under section 157.6 of the Rules a single certificate application covering in general outline along the lines of a budget estimate the proposed routine construction intended to be undertaken by it during the current or ensuing fiscal year, listing the facilities proposed, the estimated cost of each item, the capacity, purpose, and time of intended construction, customers affected by each facility proposed, effect of proposals upon gas supply and deliverability, rates, service, and other pertinent information. A hearing could then be held on such a proposal and a certificate issued in accordance with the general application. At the end of the period, a statement shall be filed showing the actions taken under the certificate and any authority thereunder which was not exercised" (15 F.P.C. at 792, 794).

Although it would appear from the above advisory statement that the Respondent contemplated a single application giving details of several individual projects, in practice the Commission did not require that the applications set forth specific details of the individual projects. Instead, all budget-type certificates were issued to companies on the basis of generalized presentations. For example, prior to its application which is the subject of these proceedings, Petitioner had twice been issued certificates which did not detail the individual projects authorized. *Tennessee Gas Transmission Company,* 22 F.P.C. 195 (1959) and 23 F.P.C. 297 (1960).

Petitioner's application that is the subject herein was filed with Respondent on October 4, 1960 and docketed as Docket No. CP61-106 (R. 1717). After outlining Petitioner's policy of continuously acquiring additional natural gas reserves either by purchase from

producers or by development of wholly owned reserves, the application stated that the facilities Petitioner intended to construct were necessary to enable Petitioner "to receive deliveries of natural gas into its pipeline system during the calendar year 1961." There was no specification of whether these deliveries into Petitioner's pipeline system were to be from gas purchased on a unit basis, or from gas produced from reserves that Petitioner had developed on gas leases it had acquired.

A combined notice of Petitioner's application and of a date of hearing thereon was issued by Respondent on November 29, 1960 (R. 1724). There being no interventions, the matter was heard under Respondent's procedure for uncontested proceedings and a certificate was issued on January 6, 1961 (R. 1728).

The order authorized the construction and operation of facilities "as more fully described in the application" (R. 1730). The facilities so authorized were limited in the aggregate to $5,000,000 with no single project to exceed a cost of $500,000. The order also required that Petitioner on or before March 1, 1962, submit to Respondent a statement under oath setting forth the details of each project. In addition the order provides that "The purpose of this 'budget-type' application is to augment Applicant's ability to act with reasonable dispatch in contracting for and connecting to its existing pipeline system new supplies of natural gas in various producing areas generally coextensive with said system" (R. 1728). Again there was no specification of the source of the gas or limitation that would preclude the delivery from Petitioner's own reserves.

Pursuant to such authorization, Petitioner constructed among other projects 2.63 miles of 12¾ inch gathering line at a cost of approximately $288,000 in order to connect to its pipeline system natural gas to be produced from leasehold interests purchased by Petitioner from Pan American Petroleum Company ("Pan American") in the Bastian Bay Field, Plaquemines Parish, Louisiana (R. 1174, 1175). This small gathering line was placed in operation on February 3, 1961 (R. 2152).

By letter of February 23, 1961, the Secretary of Respondent stated that Respondent had noticed from news accounts that Petitioner had acquired the Bastian Bay leases from Pan American and that gas produced from such leases was being transported through Petitioner's transmission system. The letter requested that Petitioner submit information with respect to the docket number of the authorization pursuant to which such operations were being conducted (R. 17). Petitioner responded informing Respondent that deliveries of natural gas from the Bastian Bay leases were currently being made into Petitioner's transmission system via the 2.63 miles of 12¾ inch gathering line. Respondent was further advised that said gathering line was constructed pursuant to the aforesaid certificate issued in Docket No. CP61-106.

Respondent, by order issued April 6, 1961, reopened the proceedings in Docket No. CP61-106 reciting that it had been informed that Petitioner had purchased oil and gas leases owned by Pan American in the Bastian Bay Field and that Petitioner had connected such leases to its transmission system pursuant to authori-

tion granted in Docket No. CP61-106 (R. 1732). Respondent stated that it had no information regarding the facilities constructed by Petitioner to the Bastian Bay Field and that there was "ground for reasonable doubt as to whether said construction actually comes within the authorization granted in Docket No. CP61-106" (R. 1732).

Petitioner filed an application for rehearing of this order, which was subsequently denied on June 29, 1961. Prior to such denial Respondent, by order issued May 17, 1961 (R. 1803), set the reopened Docket No. CP61-106 for hearing on July 5, 1961 and ordered Petitioner to go forward on that date with the presentation of evidence on the issues posed by the ordering paragraph "A" of the order of April 6, 1961, which provided as follows (R. 1733):

> "(A) The proceedings designated as Docket No. CP61-106 are hereby reopened for the purpose of determining:
>
> "(1) Whether the authorization issued on January 6, 1961, to Tennessee Gas Transmission Company covered the construction and operation of the facilities necessary to connect the the Bastian Bay Field reserves to Tennessee's system, and
>
> "(2) The cost of making natural gas from such reserves available to the Tennessee system."

Hearings were held and evidence was presented by Petitioner, most of which was presented by Petitioner at the direction of the Examiner and over Petitioner's protest. No evidence was submitted by Respondent or

any party to the proceedings [3] with the minor exception of some State Commission orders and items by reference introduced through counsel. Petitioner has consistently taken the position that Respondent's reopening of the proceeding was unlawful and that the procedures thereafter followed shifted the burden of proof to Petitioner and were in violation of the Natural Gas Act (R. 23).

On August 25, 1961, Respondent ordered Pan American, which company was not a party to Docket No. CP61-106, to submit information concerning its acquisition of, and investment in, the Bastian Bay leases which it had conveyed to Petitioner (R. 1858). Thereafter on March 12, 1962, Respondent issued in Docket No. CI62-1034 an order directing Pan American to show cause why it should not be found to be engaged in the sale of natural gas to Petitioner from the Bastian Bay Field subject to the jurisdiction of Respondent without requisite authorization (R. 1913). The order further consolidated said proceeding with that involving Petitioner at Docket No. CP61-106. Further hearings were then held on May 7 and 8, 1962 and were concluded on June 26, 1962 with the presentation of Pan American's evidence. Thereafter, the Presiding Examiner issued an Initial Decision on April 1, 1963 in which he reached conclusions similar to those eventually set forth by Respondent in Opinion No. 413 and

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[3] By order of May 12, 1961 (R. 1802A) the following were permitted to intervene: Long Island Lighting Co., City of Pittsburgh, Pa., The Brooklyn Union Gas Co., The East Ohio Gas Co., Hope Natural Gas Co., Lake Shore Pipe Line Co., New York State Natural Gas Corp., The Peoples Natural Gas Co., The United Gas Improvement Co., Consolidated Edison Co., Fuels Research Council, Inc., National Coal Ass'n and United Mine Workers of America.

the accompanying order herein complained of (R. 1967). Exceptions to the Presiding Examiner's Initial Decision were duly filed by Petitioner and Pan American (R. 2095, 2027). Petitioner and Pan American requested oral argument, which was held before Respondent on September 24, 1963, and on December 12, 1963, Respondent issued its Opinion No. 413 and accompanying order.

In its Opinion No. 413 and accompanying order Respondent determined that the 2.63 miles of gathering line built by Petitioner to connect to its transmission system natural gas produced from the Bastian Bay Leases, "is a jurisdictional facility constructed without authorization of this Commission" and further determined that the sale by Pan American of leases in the Bastian Bay Field constituted "a sale of natural gas in interstate commerce for resale, similarly without authorization of this Commission as required by the Act" (R. 2159). The basis for declaring that Petitioner's 2.63 mile gathering line was not authorized was that (1) it was not routine construction because of the size and cost of the reserve attached and (2) the certificate as issued did not authorize the attachment of reserves owned by Petitioner.

Respondent thereupon required that within six months of the date of the December 12, 1963 opinion and order both Petitioner and Pan American make such filings and take such steps necessary to bring them into compliance with the Natural Gas Act.

Rehearing was denied by Respondent by order issued February 4, 1964, one of the orders herein complained of, but Respondent did, however, stay the effectiveness of its decision of December 12, 1963 until six months after issuance of final mandate of the courts (R. 2223).

Appeal was taken by Pan American to the Court of Appeals for the Tenth Circuit in No. 7659 and Petitioner's appeal to the Fifth Circuit was removed to the Tenth Circuit and heard as No. 7751. Respondent's determination that the transfer of leases by Pan American was subject to its jurisdiction was reversed by the Tenth Circuit based on this Honorable Court's holding in *Federal Power Commission* v. *Panhandle Eastern Pipe Line Company,* 337 U.S. 498 (1949). Respondent's determination that Petitioner's construction and operation of the 2.63 mile gathering line had not been authorized was affirmed.

In affirming Respondent's Opinion No. 413 with respect to the construction undertaken by Petitioner, the Tenth Circuit held that it was the duty and intent of the Respondent to examine all facets of a dedication of natural gas to interstate commerce. Also the Court held that it was the Commission's intent to authorize construction which was routine and minor in nature and the impact of the attachment of the Bastian Bay Field removed it from this category notwithstanding the minor extent of the facilities involved. As previously noted, the Tenth Circuit denied rehearing of its determination with respect to Petitioner on February 11, 1965, but on February 19, 1965 stayed its mandate until the disposition of these proceedings.

REASONS FOR GRANTING THE WRIT

1. These proceedings involve an important question with respect to the administration of the Natural Gas Act and indeed any regulatory statute providing for licensing. Basically, the question is the latitude allowed a regulatory agency in subsequently concluding

that a generalized authorization it has previously granted covering a group of non-specified projects does not cover a particular project which particular project was constructed in accordance with the prescribed conditions in the authorization.

It is perfectly apparent that the Respondent's contention that Petitioner required further certificate authorization with respect to the Bastian Bay line was based upon the assumption that the Respondent had jurisdiction over the lease-sale transaction. It is submitted that such contention was dictated solely by Respondent's desire to fortify such assumption. In order for the Respondent to assert jurisdiction over the lease-sale transaction it also had to take the position that Petitioner needed additional certificate authorization to construct the line in order to connect the reserves. Had Respondent not attempted to expand its jurisdiction to include the lease-sale, no question would ever have been raised about the construction of the Bastian Bay line by Petitioner. But the lower Court's decision which Respondent herein seeks to have reviewed in *Federal Power Commission* v. *Pan American Petroleum Corp.*, also sought to be reviewed in *Pennsylvania Utility Commission* v. *Pan American Petroleum Corp.*, Nos. 1024 and 1025, this term, has laid bare Respondent's basic error in this jurisdictional conclusion and has made clear that Respondent's assumption of jurisdiction over the lease transaction was beyond its power under the Natural Gas Act. Once the construction of the small gathering line built by Petitioner under the authority of its certificate issued by Respondent is considered separately and apart from the non-jurisdictional lease transaction, as it must be, it can only be concluded that the construction of such line was

of the precise type contemplated by the budget-type certificate.

The question here involved goes to the validity of *all* of the many[4] "budget-type" certificate authorizations, and possibly others, that have been issued by Respondent. If the Respondent chooses to review the facilities constructed and the operations carried on and decides, on the basis of events or circumstances that were not present or contemplated at the time the authorization was issued that the projects have not in fact been authorized then all budget-type certificates are suspect. Furthermore, there is involved the collateral issue of the point in time at which the actual completed construction is to be judged with the Respondent's policy on what is permissible construction under a budget-type authorization. Thus the Court below, erroneously in our view, sought to support a contention that the Respondent did not intend to include in budget-type authorizations facilities for the attachment of a company's own reserves by reference to Respondent's rules promulgated over eighteen months *after* the issuance of the certificate herein.[5]

2. It is Petitioner's view, which it seeks to argue to this Honorable Court, that it is incumbent on Respondent to definitely fix by regulation the standards governing the issuance of such certificates. We have already outlined our argument showing that there was not the slightest suggestion that authorizations did not

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[4] Since the inception of the budget-type certificate in 1956 virtually every major pipe line regulated by the Commission obtains such an authorization each year.

[5] Although not stated in the decision below, the quotation in footnote 1 thereof, *infra* pp. 3a-4a, is from Order No. 247, issued June 7, 1962, 27 F.P.C. 1119.

cover the attachment of company-owned reserves. On the contrary, Petitioner had, with Respondent's knowledge, used a budget-type certificate for this precise purpose.

Respondent in an evident attempt to overwhelm by sheer weight of numbers stressed the fact that reserves attached in the certificate under review totaled 750 million Mcf and cost $159,463,500. The size of reserves to be attached by a budget-type facility had never been mentioned or referred to in any manner in any application or authorization prior to this time.

Outside of the fact that the specific construction authorized by the certificate was only for 2.63 miles of line costing some $288,000 and was admittedly not substantial, the effect of the construction should be compared with the size of Petitioner's operation and Respondent's prior authorizations. Thus the 750 million Mcf and $159,463,500 should be first compared with the fact that two other projects which Respondent does not dispute were built in compliance with the very same "budget-type" authorization involved the attachment of reserves totalling respectively 345 million Mcf and 213 million Mcf, (R. 1411), and at the initial prices approved by settlement agreement in each instance [6] the total cost of gas for the respective projects would approximate $67,275,000 and $45,795,000. Moreover, 750 million Mcf which Respondent found to be the Bastian Bay reserves is considerably less than a single year's gas requirements of Petitioner, and during the calendar year 1963, the deliveries from Bastian

[6] *Union Texas Petroleum, et al.*, 29 F.P.C. 730, 731 (1963); *Shell Oil Company*, 28 F.P.C. 257, 264 (1962). With escalation provisions that remain in the contracts, the total cost of gas over the life of these contracts could well exceed these totals.

Bay represented only 1.9 percent of total deliveries into Petitioner's pipeline system.[7]

Finally, it should be noted that Petitioner's sales rates are lower at the present time than as approved by Respondent in 1962, so there has been no adverse impact on Petitioner's customers resulting from the attachment of the Bastian Bay reserves.

The above wholly refutes the holding of the Court below that "The acquisition and utilization of the Bastian Bay resources were neither routine nor minor in their impact and the very magnitude of the event was properly considered by the Commission as a factor negativing the authority claimed under the 'budget-type' certificate." Instead of this subjective impression of what is substantial, proper administration of the Natural Gas Act requires fixed standards advising all those seeking a "budget-type" authorization of the limits of what may be applied for and authorized.

3. Absent fixed and definite standards announced *prior* to authorization, Respondent's "hind-sight" determination that no certificate was issued is simply and obviously an attempt to avoid the clear holding of this Honorable Court in *United States* v. *Seatrain Lines,* 329 U.S. 424 (1947),[8] that an agency may not revoke a license without specific statutory authority to do so. The Natural Gas Act provides no such authority, but the Commission herein would expand broadly its powers under the Act by the device of reopening the proceedings and holding that on the basis of its "afterthoughts" a certificate had not in fact issued.

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[7] Source: 1963 FPC Form 2 of Petitioner.

[8] See also: *C.A.B.* v. *Delta Air Lines, Inc.,* 367 U.S. 316 (1961).

4. The grant of this petition and reversal of the Court below would in no way preclude full review of the arrangement under which Petitioner acquired reserves in the Bastian Bay Field. The companion determination of the Court below holding that the Commission has no jurisdiction over Pan American's sale of leases to Petitioner is the subject of petitions for certiorari filed by Respondent and the Public Service Commission of the State of Pennsylvania (Nos. 1024 and 1025, this Term). If these petitions are granted and the Court below is reversed in that determination, Pan American would presumably file a certificate application for authorization to carry out its contract for sale of the leases. At that time the Commission could consider the propriety of the lease transfer.

On the other hand, if the Court below is affirmed respecting the lease transfer, it is obvious that Respondent's regulation of Petitioner would still extend to the latter's wholesale rates as well as its construction program. In this regard the Court of Appeals for the District of Columbia Circuit, in a case similar to the case-at-bar in which a natural gas pipeline company had acquired reserves via a non-jurisdictional lease sale, stated as follows:

> "It was entirely within the Commission's power to certify the pipeline construction program without passing upon the financial merits of the gas acquisition arrangement * * *." *Public Service Commission of New York* v. *F.P.C.*, 287 F. 2d 143, 145 (D.C. Cir. 1960).

There, however, the Commission's issuance of a certificate was reversed because, notwithstanding the fact that it need not have decided the issue in certificate cases, it had purported to pass upon the financial

merits of the acquisition although without substantial evidence to support its conclusions. It is not contended here that the Commission passed upon the financial merits of the lease acquisition arrangement, and Petitioner is confident that in a rate case it could readily support its purchase of the Bastian Bay reserves.*

CONCLUSION

For the foregoing reasons, this petition for writ of certiorari should be granted.

Respectfully submitted,

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* In strenuously supporting its lease acquisition costs in a future rate case Petitioner would show that it entered into the Bastian Bay transaction for the purpose of enabling it to maintain and expand its service. Moreover, Petitioner has not sought to increase any of its wholesale rates appproved by Respondent in 1962, thus indicating no adverse impact from the purchase of the reserves.

APPENDIX

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 7751

November Term, 1964

TENNESSEE GAS TRANSMISSION COMPANY, *Petitioner*

vs.

FEDERAL POWER COMMISSION, *Respondent*

PENNSYLVANIA PUBLIC UTILITY COMMISSION and THE COMMONWEALTH OF PENNSYLVANIA, *Intervenors*

On Petition to Review an Order of the
Federal Power Commission

Stanley M. Morley of May, Shannon and Morley, Washington, D.C., (W. C. Braden, Jr., and B. J. Williamson, Houston, Texas, were with him on the brief) for Petitioner.

Howard E. Wahrenbrock, Solicitor, (Richard A. Solomon, General Counsel, Robert L. Russell, Asst. General Counsel, and Israel Convisser, Washington, D.C., were with him on the brief) for Respondent.

Before MURRAH, Chief Judge, and PHILLIPS and LEWIS, Circuit Judges.

LEWIS, Circuit Judge.

This case is related to but not determined by our consideration in Pan American Petroleum Corporation v. FPC, No. 7659, this day decided, and brings the petitioner

Tennessee Gas Transmission Company seeking review under section 19(b) of the Natural Gas Act, 15 U.S.C. § 717r(b), of an order of the Federal Power Commission. The subject order is premised upon a finding that Tennessee constructed and is operating facilities for the transportation and sale of gas without the requisite Commission authorization and orders Tennessee to take steps to bring it in compliance with the provisions of the Natural Gas Act.

On December 1, 1960, Tennessee acquired from Pan American, through a non-jurisdictional conveyance of oil and gas leases, extensive interests in the Bastian Bay Field in Louisiana. On October 4, 1960, Tennessee had applied to the Commission for a so-called "budget-type" certificate of public convenience and necessity for the calendar year 1961 which, upon approval, would authorize Tennessee to expend not more than $5,000,000 for the construction and operation of gas purchase facilities with a limitation of $500,000 upon the total cost of a single facility. The application was approved and, on January 6, 1961, the Commission issued the certificate as requested by Tennessee. Thereafter, Tennessee, in reliance upon this "budget-type" certificate, constructed a pipeline from the Bastian Bay Field into its main transmission line, a distance of 2.63 miles with a cost of approximately $288,000. The practical effect of the construction was to attach to the Tennessee distribution system the potential of 750 billion cubic feet of natural gas at an estimated cost of $159,463,500.

The Commission, after it obtained knowledge but not notice of Tennessee's acquisition of the Pan American leases and the construction of the pipeline, reopened the proceedings related to the issuance of the "budget-type" certificate to explore the question of whether Tennessee's connecting facility was authorized by the certificate. After a hearing which was expanded to consider the jurisdictional

aspects of the Pan American-Tennessee conveyance, the Commission determined that the construction of the Bastian Bay Field pipeline was not within the actual or legal contemplation of the "budget-type" certificate and was thus an unauthorized facility within the Commission's jurisdiction. We think it almost self-evident that the ruling and order of the Commission in such regard are manifestly correct and proper when projected against the over-all purpose of the Natural Gas Act and the policy, purpose and procedure pertaining to the issuance of "budget-type" certificates.

Whenever natural gas is dedicated to interstate commerce it is the manifest duty of the Commission to scrutinize the transaction in all its facets to the end determination of the public convenience and necessity. *Atlantic Refining Co.* v. *Public Service Comm'n* (*CATCO*), 360 U.S. 378, 391-92. This duty cannot be declined by regulation or otherwise nor can it be postponed absent consent of those immediately concerned. *Sunray Mid-Continent Oil Co.* v. *FPC*, 10 Cir., 270 F. 2d 404. The Commission cannot pre-grant a certificate and by so doing lose its basic jurisdiction to exercise regulatory powers. To do so would be to abandon the administrative process. But the Commission may adopt regulatory policies and procedures which further the purposes of the Act and result in practical and desirable abridgments to the accomplishment of those purposes. Such is clearly the intent of the Commission in its issuance of "budget-type" certificates and its expressed policy and regulatory aids pertaining thereto.[1]

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[1] The applicable regulation provides (18 CFR § 2.58): "Budget-type certificate applications—gas purchase facilities.

"In accordance with the Commission's advice in Order No. 185, issued February 8, 1956 (15 FPC 793 at 794) and unless prevented by other factors, such as interventions in opposition, we will issue budget-type authorizations to natural gas pipeline companies covering the construction and operation of gas purchase facilities after hearing under the abridged procedure, upon applications for cer-

That a "budget-type" certificate is intended by the Commission to apply only to routine expenditures which would

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tificates of public convenience and necessity, filed under § 157.6 of this chapter, provided that:

"(a) The total estimated cost of the facilities to be installed in a given twelve-month period does not exceed 1½ percent of the applicant company's plant account or $5,000,000 whichever is the lesser.

"(b) The total cost of any single project facilities to be installed during the authorization period does not exceed 25 percent of the total budget amount or $500,000, whichever is the lesser.

"(c) The applicant agrees to file with the Commission, within sixty days after expiration of the authorization, a statement showing for each individual project:

"(1) Description of facilities installed, i.e., miles and size of pipelines, compressor horsepower, metering facilities.

"(2) Location of facilities.

"(3) Actual installed cost of facilities subdivided by size of pipe, compressing, metering and appurtenant facilities.

"(4) Estimated recoverable gas reserves in Mcf at 14.73 psia made available to applicant by means of the facilities.

"(5) Names of fields connected.

"(6) The names of the independent producers from whom the gas is being purchased together with the respective dates of the gas sales contracts and the docket number of the related seller.

"(d) 'Gas purchase facilities' means those facilities necessary to connect the applicant's system with the facilities of a seller authorized by this Commission to make a sale for resale in interstate commerce to the applicant."

And the expressed policy of the Commission describes the budget-type application as

> ". . . a single certificate application covering in general outline along the lines of a budget estimate the proposed routine construction intended to be undertaken by it during the current or ensuing fiscal year, listing the facilities proposed, the estimated cost of each item, the capacity, purpose, and time of intended construction, customers affected by each facility proposed, effect of proposals upon gas supply and deliverability rates, service, and other pertinent information." 15 F.P.C. 793 at 794 (Order No. 185), 21 Fed. Reg. 1485.

leave but an unnoticeable impact upon price structure, and that Tennessee so understood the limitation, is made manifest by Tennessee's application. The company there stated:

> "During the present calendar year Applicant has substantially improved its over-all system gas supply. This has been made possible in part by the ability of Applicant to attach new reserves pursuant to its 'budget-type' authorization to construct the necessary facilities without the time consuming requirement of obtaining specific authorization. In addition, the 'budget-type' authorization enabled certain of the independent producers to initiate the sale of gas to Applicant pursuant to Section 157.28 of the Commission's Regulations Under the Natural Gas Act, pending final Commission action on their certificate applications.
>
> "When granted, the authorization requested herein will relieve Applicant of the time and expense of preparing numerous relatively minor certificate applications, and the Commission and its Staff of the burden of processing such routine applications. Furthermore, this application is consistent with the policy declaration of the Commission contained in its Order No. 185."

And it is equally apparent that Tennessee did not contemplate that the certificate would cover the Bastian Bay Field project because, although the transaction with Pan American was imminent, Tennessee stated in its application that it did "not know the quantity or location of the gas supply to be connected to Applicant's system as contemplated herein."

We are not impressed with the emphasis that Tennessee places upon the admitted fact that its connecting facility was constructed in literal compliance with the monetary restrictions contained in the "budget-type" certificate. The fact that the proximity of Tennessee's main transmission line to the vast resources of the Bastian Bay Field allowed

the pipeline to be built at a cost of $288,000 is a mere economic coincidence and does not unequivocally establish the the construction as routine or minor in nature. The very term "budget-type" contemplates an anticipated projection of probable expenditures for routine maintenance and expansion of such minor impact upon price structure that a blanket advance approval, rather than the delay and difficulty of standard administrative practice, is warranted. The acquisition and utilization of the Bastian Bay resources were neither routine nor minor in their impact, and the very magnitude of the event was properly considered by the Commission as a factor negativing the authority claimed under the "budget-type" certificate.

So, too, we find no merit in Tennessee's contention that, even if the construction was not covered by the certificate, the Commission erred by reopening the earlier proceedings. While it admits that the Commission may have been able to issue a show cause order or to begin new proceedings to determine that Tennessee had exceeded its authorization, it claims that the Commission must strictly follow the procedures outlined by the governing statutes and regulations and could not alter, amend, or revoke the certificate, that had become final, by reopening the proceedings. In support of this contention Tennessee relies on *United States* v. *Seatrain Lines,* 329 U.S. 424, which held that the Interstate Commerce Commission was without authority to reopen certification proceedings to cancel or amend a certificate of public convenience and necessity, and *CAB* v. *Delta Air Lines, Inc.,* 367 U.S. 316, which held that the Civil Aeronautics Board could not alter a certificate of public convenience and necessity once it had become effective without complying with the statutory requirements of formal notice and hearing. Neither of these cases supports Tennessee's contention; in the case at bar the Commission did not purport to alter or revoke Tennessee's certificate but merely to determine whether the pipeline construction was authorized by the order and certificate

as granted. Since Tennessee was not prejudiced by the Commission's actions, the fact that the original proceedings were reopened can be of no significance.

The order of the Commission is affirmed.

Judgment

Thirty-Second Day, November Term, Wednesday, December 30th, 1964.

Before Honorable Alfred P. Murrah, Chief Judge, and Honorable Orie L. Phillips and Honorable David T. Lewis, Circuit Judges.

This cause came on to be heard on petition to review an order of the Federal Power Commission and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the order of the Federal Power Commission be and the same is hereby affirmed.

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 7659

November Term, 1964

PAN AMERICAN PETROLEUM CORPORATION, *Petitioner*

v.

FEDERAL POWER COMMISSION, *Respondent*

PENNSYLVANIA PUBLIC UTILITY COMMISSION and THE COMMONWEALTH OF PENNSYLVANIA, *Intervenors*

On Petition to Review an Order of the Federal Power Commission

Carroll L. Gilliam, Washington, D.C., (J. P. Hammond, Karl R. Goldsmith and Clifford O. Stone, Jr., Tulsa, Oklahoma, William J. Grove, Washington, D.C., and O'Bryan, Grove, Paglin, Jaskiewicz, Sells, Gilliam & Putbrese, Washington, D.C., Of Counsel, were with him on the brief) for Petitioner.

Howard E. Wahrenbrock, Solicitor, (Richard A. Solomon, General Counsel, Robert L. Russell, Asst. General Counsel, and Israel Convisser, Washington, D.C., were with him on the brief) for Respondent.

Before MURRAH, Chief Judge, and PHILLIPS and LEWIS, Circuit Judges.

LEWIS, Circuit Judge.

Pan American Petroleum Corporation seeks review under section 19(b) of the Natural Gas Act, 15 U.S.C. § 717r(b), of an order of the Federal Power Commission

wherein the Commission assumed jurisdiction under section 7 of the Act over a transaction between Pan American and Tennessee Gas Transmission Company, the latter company being an interstate natural gas pipeline company. The dispositive question is whether the subject transaction constituted an assignment of oil and gas leases and was thus exempt under section 1(b) of the Act,[1] *FPC* v. *Panhandle Eastern Pipeline Co.*, 337 U.S. 498, or a sale of gas for resale in interstate commerce and so was under the regulatory cognizance of the Commission, *Phillips Petroleum Co.* v. *Wisconsin*, 347 U.S. 672.

During the years 1954 through 1959 Pan American acquired twelve leases upon what was initially undeveloped acreage in what is now known as the Bastian Bay Field in Plaquemines Parish, Louisiana. In December, 1955, an exploratory well was completed and thereafter a total of 32 wells were drilled upon six of the leases by Pan American either as wholly owned wells or in conjunction with others sharing operating rights. No wells were drilled upon the other six leases. Although the field was proven, Pan American made no sales for consumption, did not connect the wells to an interstate transmission pipeline or collection facilities and did not establish any permanent production units. Such quantities of gas as were produced were flared or consumed in the field.

On December 1, 1960, Pan American conveyed its interests to Tennessee for a stated price of $159,463,500 pursuant to a contract designated as a Lease Sale Agreement and consummated by an "Assignment and Conveyance." Of this price, Tennessee paid $9,427,104 at the time of transaction and obligated itself for seventeen further annual payments evidenced by promissory notes. The agreed price was based upon estimated reserves and pro-

[1] Section 1(b) provides, *inter alia*, that the Commission's jurisdiction shall not reach "facilites used for . . . the production or gathering of natural gas." 15 U.S.C. § 717(b).

vided for re-determination of the reserves upon the request of either party between 1969 and 1973, and for adjustment of the purchase price on the basis of such determination. The pricing formula was equated to 21¢ per Mcf. for the reserves attributable to the interest assigned. Tennessee agreed to develop and produce the leases and to negotiate contracts with royalty owners for the payment of royalties and reimbursement of Louisiana severance taxes. And the assignment was subject to the following reservations: (1) Pan American retained its rights in minerals other than natural gas, oil, and other petroleum liquids; (2) Pan American retained its rights in the leases below the bottom of the deepest presently-known productive horizons; (3) Pan American reserved as a production payment all proceeds received by Tennessee from the sale of oil produced on the leased acreage, such payments to terminate when 85 per cent of the recoverable reserves of oil have been produced; (4) Pan American reserved a similar production payment for proceeds received by Tennessee from the sale of separator liquids, with detailed provisions relating to the deduction of Tennessee's costs and expenses; and (5) Pan American retained the right to process all gas produced from the assigned leaseholds, including that attributable to certain outstanding royalty interests, for recovery of natural-gas liquids, agreeing to pay Tennessee for plant losses and use of gas as fuel.

Approval of the transaction was neither obtained nor sought from the Federal Power Commission. In 1961, Tennessee constructed a 12-inch connecting pipeline from the field to that company's main interstate transmission system. See *Tennessee Gas Transmission Co.* v. *FPC*, No. 7751, 10 Cir., this day decided.

In substance, the contractual provisions of the Pan American-Tennessee agreement are not legally distinguishable from those considered by the Fifth Circuit recently in *Marr* v. *FPC*, 336 F. 2d 320. There, as here, the thrust of the

Commission's argument to support its claim of jurisdiction lies in its conclusion that the ultimate benefit that accrues to Tennessee is the acquisition of dry gas; that the legal effect of an instrument should be determined from the actuality of the transaction, that Congress intended that the Commission have all necessary powers to regulate the sale of gas in commerce effectively and that, absent jurisdiction of the subject and similar transactions, a regulatory gap exists which defeats the intended purposes of the Commission's creation. Such arguments are but a denial of the Supreme Court decision in *Panhandle*, supra, and can find no comfort in that court's later decision in *Phillips*, supra. The basic distinction between conveyances relating to simple acreage and facilities for production and gathering, over which the Commission has no jurisdiction, and the sale of gas in interstate commerce, over which the Commission does have jurisdiction, is not determined by nor dependent upon the contemplated but unrealized benefit to the parties. The conveyance must trigger the sale of gas in interstate commerce, not just shade the background. *Saturn Oil & Gas Co.* v. *FPC*, 10 Cir., 250 F. 2d 61, 68, cert. denied, 355 U.S. 956. And the parties may deliberately avoid the jurisdiction of the Commission by remaining beyond the bounds of interstate commerce or within the exception to the Commission's regulatory powers in such commerce. *Sunray Mid-Continent Oil Co.* v. *FPC*, 10 Cir., 270 F. 2d 404, 409.

Our inquiry, then, must determine whether the Pan American transfers were leases within the compulsion of *Panhandle*. We conclude, as did the Fifth Circuit in *Marr*, that the subject conveyances were leases and consequently not within the Commission's jurisdiction under section 7 of the Act but were exempt under section 1(b). We are in complete accord with the views expressed by Judge Rives in his able opinion in *Marr* and find them to be equally applicable to the case at bar.

The orders are reversed and the cause remanded to the Commission for further proceedings consistent with the views here expressed.

Judgment

Thirty-Second Day, November Term, Wednesday, December 30th, 1964.

Before Honorable Alfred P. Murrah, Chief Judge, and Honorable Orie L. Phillips and Honorable David T. Lewis, Circuit Judges.

This cause came on to be heard on petition to review orders of the Federal Power Commission and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the orders are reversed and the cause remanded to the Federal Power Commission for further proceedings consistent with the views expressed in the opinion of the court.

STATUTE INVOLVED

The Natural Gas Act, 52 Stat. 821, 15 U.S.C. 717-717w, as amended, 56 Stat. 83-84, 15 U.S.C. 717f provides in pertinent part as follows:

Section 7—

(c) No natural-gas company or person which will be a natural-gas company upon completion of any proposed construction or extension shall engage in the transportation or sale of natural gas, subject to the jurisdiction of the Commission, or undertake the construction or extension of any facilities therefor, or acquire or operate any such facilities or extensions thereof, unless there is in force with respect to such natural-gas company a certificate of public convenience and necessity issued by the Commission authorizing such acts or operations: *Provided, however,* That if any such natural-gas company or predecessor in interest was bona fide engaged in transportation or sale of natural gas, subject to the jurisdiction of the Commission, on the effective date of this amendatory Act, over the route or routes or within the area for which application is made and has so operated since that time, the Commission shall issue such certificate without requiring further proof that public convenience and necessity will be served by such operation, and without further proceedings, if application for such certificate is made to the Commission within ninety days after the effective date of this amendatory Act. Pending the determination of any such application, the continuance of such operation shall be lawful.

In all other cases the Commission shall set the matter for hearing and shall give such reasonable notice of the hearing thereon to all interested persons as in its judgment may be necessary under rules and regulations to be prescribed by the Commission; and the application shall be decided in accordance with the procedure provided in subsection (e) of this section and such certificate shall be issued or denied accordingly: *Provided, however,* That the Commission may issue a temporary certificate in cases of emergency, to assure maintenance of adequate service or to serve particular customers, without notice or hearing, pending the determination of an application for a

certificate, and may by regulation exempt from the requirements of this section temporary acts or operations for which the issuance of a certificate will not be required in the public interest.

(e) Except in the cases governed by the provisos contained in subsection (c) of this section, a certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the operation, sale, service, construction, extension, or acquisition covered by the application, if it is found that the applicant is able and willing properly to do the acts and to perform the service proposed and to conform to the provisions of the Act and the requirements, rules, and regulations of the Commission thereunder, and that the proposed service, sale, operation, construction, extension, or acquisition, to the extent authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied. The Commission shall have the power to attach to the issuance of the certificate and to the exercise of the rights granted thereunder such reasonable terms and conditions as the public convenience and necessity may require.

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In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 1093

TENNESSEE GAS TRANSMISSION COMPANY, PETITIONER

v.

FEDERAL POWER COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE FEDERAL POWER COMMISSION IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Appeals for the Tenth Circuit (Pet. App. pp. 1a–7a) is reported at 340 F. 2d 100. The opinion and orders of the Federal Power Commission (J.A. 241–250, 259–260)[1] are reported at 30 FPC 1477 and 31 FPC 241.

JURISDICTION

The judgment of the court of appeals affirming the Commission order was entered on December 30, 1964 (Pet. App. p. 7a). A timely petition for rehearing was denied on February 11, 1965. The petition for a

[1] "J.A." refers to the joint appendix below.

writ of certiorari was filed on April 21, 1965. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and Section 19(b) of the Natural Gas Act, 15 U.S.C. 717r(b).

QUESTION PRESENTED

Whether the Commission reasonably concluded that the construction and operation of certain facilities by petitioner were without the authorization required by Section 7 of the Natural Gas Act.

STATUTE INVOLVED

The pertinent provisions of the Natural Gas Act are set forth in the Appendix to the petition at pages 13a–14a.

STATEMENT

The court below affirmed a Commission order that (1) found that Tennessee Gas Transmission Company had constructed and was operating certain facilities for the transportation and sale of natural gas in interstate commerce without requisite Commission authorization under Section 7 of the Natural Gas Act and (2) required Tennessee to take steps to bring itself into compliance with the Act. In reaching this conclusion, the Commission held specifically that a so-called "budget-type" certificate of public convenience and necessity that it had previously issued to Tennessee did not, contrary to the company's claim, authorize Tennessee's facilities to transport gas from the Bastian Bay Field to its main transmission line.

The certificate on which Tennessee relied had been issued on a so-called "budget-type application" for

the year 1961. Such an application, as contemplated by Commission Order No. 185,[2] is one designed to secure certificate authorization for construction of a minor and routine kind, with respect to which it is [redacted] cation is processed under a shortened procedure and normally results in a relatively prompt issuance of a certificate.

Tennessee's budget-type application was received by the Commission on October 4, 1960 (Pet. App. p. 2a). Its declared purpose was to "relieve Applicant of the time and expense of preparing numerous relatively minor certificate applications, and the Commission and its Staff of the burden of processing such routine applications." It purported to be "consistent with the policy declaration of the Commission contained in its Order No. 185" (J.A. 177–178). The Commission published notice of the application, stating that Tennessee was requesting budget-type authorization for facilities to enable it "to take into its certificated main transmission pipeline system natural gas which will be purchased from time to time during" 1961, that a hearing thereon would be held on December 27, 1960, and that protest or petitions to intervene could be filed on or before December 19, 1960 (J.A. 185). On December 27, there having been no opposition or petition to intervene, staff counsel requested omission of the intermediate decision procedure (J.A. 186). Ten days later, on January 6, 1961, without

[2] 21 Fed. Reg. 1485. That order, explaining the budget-type certificate application, is discussed, *infra*, pp. 7–8.

further hearing, the Commission issued a budget-type certificate authorizing Tennessee "to construct and operate the proposed facilities to take natural gas from producers" (J.A. 186–188, 25 FPC 129). The budget authorization permitted a total expenditure of not more than $5,000,000 for the construction of gas purchase facilities with the added limitation of $500,000 upon the total cost of a single facility (Pet. App. p. 2a).

Purportedly in reliance on this certificate, Tennessee installed, at a cost of about $288,000, a 2.63 mile pipeline for the transmission to its interstate system of natural gas from reserves totalling approximately 750 billion cubic feet under leaseholds in the Bastian Bay Field in Louisiana, purchased from Pan American Petroleum Corporation for approximately $160,000,000 (Pet. App. p. 2a).[3] Although negotiations had culminated in a "Lease Sale Agreement" on July 15, 1960 (J.A. 60), almost three months before Tennessee's budget-type application was made, that application gave no hint of the existence of this agree-

[3] While Tennessee and Pan American treated this leasehold transaction as non-jurisdictional, the Commission, in the opinion at issue here, held it to be a jurisdictional sale of natural gas. The United States Court of Appeals for the Tenth Circuit set aside that portion of the Commission's opinion. *Pan American Petroleum Corp.* v. *Federal Power Commission*, 339 F. 2d 694 (Pet. App. pp. 8a–12a), petition for certiorari pending, Nos. 1024 and 1025, this Term. The jurisdictional status of lease-sale agreements of this type is also presently before the Court in *United Gas Improvement Co.* v. *Continental Oil Co., et al.*, and *Federal Power Commission* v. *M. H. Marr, et al.*, Nos. 644 and 693, this Term, which are *sub judice*.

ment or that this huge block of gas was to be brought into Tennessee's system by the facilities to be certificated.

Having learned of the sale of the leases through news accounts, the Commission inquired of Tennessee by letter whether the accounts were true and, if so, by what authorization the facilities for transmission had been constructed and were being operated. Tennessee replied by letter that it had purchased the Bastian Bay Field leases and that deliveries of gas from that field were being taken into Tennessee's pipeline through facilities authorized by the certificate granted on its budget-type application (J.A. 194–195).

By order issued April 6, 1961, the Commission reopened the earlier proceedings for the purpose of determining (1) whether the January 6, 1961, budget-type authorization covered the facilities necessary to connect the Bastian Bay Field reserves to Tennessee's system and (2) the cost of making natural gas from such reserves available to the Tennessee system (J.A. 188–189).

At the conclusion of the hearings, the examiner found that the certificate did not cover the facilities, and that, therefore, they had been constructed and were being operated without Commission authorization (J.A. 226).

The Commission affirmed these findings and ordered Tennessee, within six months, to make necessary filings and to take steps to bring itself into compliance with the Natural Gas Act, particularly Sections 7(c) and 7(d) (J.A. 247). While denying Tennessee's appli-

cation for rehearing, the Commission stayed these requirements of the order until six months after the completion of court review proceedings (J.A. 260).

The court below, though setting aside that portion of the Commission's order finding the sale of the leases to be a jurisdictional sale of gas, affirmed the Commission's determination as to the scope of Tennessee's budget-type certificate and the requirement that Tennessee apply for a certificate, stating (Pet. App. pp. 5a–6a):

> * * * it is * * * apparent that Tennessee did not contemplate that the certificate would cover the Bastian Bay Field project because, although the transaction with Pan American was imminent, Tennessee stated in its application that it did "not know the quantity or location of the gas supply to be connected to Applicant's system as contemplated herein."
>
> We are not impressed with the emphasis that Tennessee places upon the admitted fact that its connecting facility was constructed in literal compliance with the monetary restrictions contained in the "budget-type" certificate. The fact that the proximity of Tennessee's main transmission line to the vast resources of the Bastian Bay Field allowed the pipeline to be built at a cost of $288,000 is a mere economic coincidence and does not unequivocally establish the construction as routine or minor in nature. The very term "budget-type" contemplates an anticipated projection of probable expenditures for routine maintenance and expansion of such minor impact upon price structure that a blanket advance approval, rather

than the delay and difficulty of standard administrative practice, is warranted. The acquisition and utilization of the Bastian Bay resources were neither routine nor minor in their impact, and the very magnitude of the event was properly considered by the Commission as a factor negativing the authority claimed under the "budget-type" certificate.

ARGUMENT

This case presents an essentially factual issue which was carefully considered by the court below. There is no conflict and the case has no general importance. Accordingly, there is no warrant for further review by this Court.

1. This case involves simply a determination of whether, in the particular circumstances, the budget-type certificate issued by the Commission to Tennessee for the year 1961 covered the connection of the Bastian Bay reserves to petitioner's main transmission facilities. The Commission and its hearing examiner held that it did not, and the court below properly affirmed.

The Commission's conclusion was the only one possible in view of the nature and purpose of a budget-type certificate. This type of certificate had its genesis in the Commission's Order No. 185, issued February 8, 1956, 15 FPC 793, 794,[4] in which the Commission discussed the problems of obtaining greater flexibility in dealing with rate filings and certificate applications, particularly with reference to the Act's requirements

[4] 21 F.R. 1485.

relating to "minor installations or changes in connection with the rendition of service to existing customers or markets." Noting that it had requested Congress's authority to exclude minor facilities from the Act's certification requirements, the Commission stated (15 FPC at 794):

> In the meantime and as a substitute, the Commission advises any interested natural-gas company subject to the Natural Gas Act that it may file under section 157.6 of the Rules a single certificate application covering in general outline along the lines of a budget estimate the proposed routine construction intended to be undertaken by it during the current or ensuing fiscal year, listing the facilities proposed, the estimated cost of each item, the capacity, purpose, and time of intended construction, customers affected by each facility proposed, effect of proposals upon gas supply and deliverability, rates, service, and other pertinent information. A hearing could then be held on such a proposal and a certificate issued in accordance with the general application. At the end of the period, a statement shall be filed showing the actions taken under the certificate and any authority thereunder which was not exercised.

Tennessee's application expressly stated that it was consistent with this policy declaration and was intended to "relieve Applicant of the time and expense of preparing numerous relatively minor certificate applications, and the Commission and its Staff of the burden of processing such routine applications" (J.A. 177–178). A certificate issued in response to such an application may not reasonably be construed as

authority for construction of facilities attaching more than 750,000,000 Mcf of reserves acquired at a cost of about $160,000,000 in a transaction that had not previously been approved by the Commission.

At the time of its certificate application, petitioner was well aware that under this Court's holding in *Atlantic Refining Co.* v. *Public Service Commission of New York*, 360 U.S. 378, the Commission has an obligation carefully to scrutinize the cost of a new gas supply before permitting it to be attached to an interstate pipeline for transportation or resale in interstate commerce. It was aware, too, that in issuing budget-type certificates the Commission was not acting in contravention of this obligation; indeed, the purpose of budget certificates was, and is, to make unnecessary multiple applications for the construction of minor or routine facilities where the only public convenience and necessity question relates to the facilities themselves, rather than to the propriety of the purchase. Thus, *after* the Commission has certificated a producer sale to a pipeline, approval of pipeline construction of a small connecting facility is routine, even though the reserves are substantial, as in the two instances referred to by petitioner (Pet. p. 13). For in such situations the economic impact of the attachment of the new reserves is fully explored in passing on the producer's certificate application. But this is plainly not the case where the Commission has never been afforded an opportunity to examine the price of the reserves or the effect of the transaction on the consuming public.

If, as Tennessee and Pan American (the seller of the reserves) were contending, the transaction was not a sale by a producer, it was clear that the acquisition would have been subject to Commission scrutiny in passing on Tennessee's application for a certificate for the connecting facility. See, *e.g.*, *Public Service Commission of New York* v. *Federal Power Commission*, 287 F. 2d 143 (C.A.D.C.). In the absence of prior approval of a producer sale, Tennessee's claim that the certificate for its connecting facility was routine is plainly unsupportable.[8] As the Tenth Circuit said (Pet. App. 3a):

> * * * We think it almost self-evident that the ruling and order of the Commission in such regard are manifestly correct and proper when projected against the over-all purpose of the Natural Gas Act and the policy, purpose and procedure pertaining to the issuance of "budget-type" certificates.

Petitioner's claim that its Bastian Bay facilities were covered by the budget-type certificate is also surprising in view of the statement in its certificate application that it did "not know the quantity or location of the gas supply to be connected to Applicant's sys-

[8] If, contrary to our position in No. 1024, this Court were to accept Tennessee's view that its facilities to Bastian Bay were attaching its own reserves, the budget-type certificate relied upon would not have constituted Commission authorization for their construction and authorization for the additional reason that the certificate by its terms covered only facilities used "to take natural gas from producers" (J.A. 187). As the Commission held (J.A. 243) "[i]t is clear that the term 'producer' as used in the order did not include Tennessee as a producer of its own reserves."

tem as contemplated herein" (J.A. 178). For its application was executed on September 30, 1960, nearly three months after the lease sale agreement for the Bastian Bay reserves had been signed by Tennessee and Pan American (J.A. 60, 176–180). In these circumstances, it is apparent as the court below held (Pet. App. p. 5a);

> * * * that Tennessee did not contemplate that the certificate would cover the Bastian Bay Field project * * *. [*]

2. Petitioner's contention (Pet. p. 14) that the Commission, without statutory authority, revoked a license previously granted is also without substance. As the court below succinctly stated (Pet. App. pp. 6a–7a):

> * * * the Commission did not purport to alter or revoke Tennessee's certificate but merely to determine whether the pipeline construction was authorized by the order and certificate as granted.

3. Petitioner's claim that its petition raises questions of general importance is without foundation; as we have shown, the issues turn on the particular circumstances. Moreover, assuming there was ever real doubt as to the scope of budget-type certificates, the Commission's regulations have been amended to codify the types of circumstances under which the budget-type certificates will be issued pursuant to the intent of Order No. 185 (27 FPC 1120, 27 Fed. Reg. 5606). Section

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[*] If, contrary to this interpretation, Tennessee had at all pertinent times contemplated construction of these connecting facilities pursuant to the budget authorization, its application would raise questions of good faith.

2.58 of the Commission's regulations, 18 C.F.R. (Cum. Supp. 1964) § 2.58, expressly restricts the applicability of pipeline gas purchase facilities budget-type certificates to facilities used to pick up gas from a seller whose sale has been certificated by the Commission.[7]

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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MAY 1965.

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[7] If, as we have urged in No. 1024, pending on petition for certiorari, this Court concludes that the lease-sale agreement was a sale of natural gas subject to the Commission's jurisdiction, it would appear that this case would be of little practical importance even to petitioner. For in that situation, gas could not legally be transported from the Bastian Bay Field without Commission authorization for the sale of the gas. If that sale is authorized, Tennessee's connecting facilities would presumably also be certificated. If the sale is not authorized, Tennessee's connecting facilities could no longer be used, whether the budget-type certificate authorized their construction and operation or not.

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